BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

For statement of the case and also statements as to the opinions below, jurisdiction, questions presented, statutes involved and specifications of errors, we refer to the foregoing petition.

POINT I

CONGRESS DID NOT DELEGATE TO THE COMMISSION A DISCRETION TO DEFINE THE SCOPE OF ITS OWN POWER. THIS PROCEEDING BEFORE THE COMMISSION WAS OF A JUDICIAL NATURE. ADMINISTRATIVE DISCRETION WAS NOT INVOLVED.

The Act provides that, upon application, the Commission "shall" declare that an applicant is not a subsidiary company of a specified holding company, if the Commission "finds" certain specified facts. Language appropriate for delegation of discretion is not used until the latter part of the section which authorizes the Commission to insert in any order granting an application, conditions requiring subsequent reports to assure the Commission that the state of facts which compels the entry of an order continues to exist so long as the order is effective.

The section is written upon the evident theory that if the facts are proven they must be found and that if the facts are found the order must be made. It defines what companies shall be within and what companies shall be without the field of Commission jurisdiction over "subsidiary companies". It is a long and carefully written statement by one thinking of matters susceptible of being

proven or disproven by evidence. No such detail or precision would be required for a grant of the broad discretions of construction and decision, exercised and so far allowed in this case.

Elsewhere in the statute (*e.g.* Sections 10-15) there often occurs a provision for ". . . such rules and regulations or orders . . . as the Commission deems necessary or appropriate . . ." The distinction so drawn between Section 2 and other sections, and between the obligation to make an order under Section 2 and the discretion to insert conditions in such an order, emphasizes the plain meaning of the words in the sentence here involved. If Congress had meant that the Commission may in its discretion exempt or regulate companies falling within the definition of subdivision (A) of the Section it would have said so, and would not have used the word "shall" in the sentence providing for exemption, nor have stated at such length the facts which an applicant for exemption must prove.

The thoroughness with which the Act described the character of interrelationships to be disproven by an applicant for exemption, is at variance with the opinion that Congress wished the Commission to formulate the rule as well as to find the facts. It also does violence to the principle that an agent cannot determine the scope of his own power by exercising a discretion not subject to judicial review.

We submit that in the absence of an explicit direction by Congress, no act should be construed as leaving its interpretation and the field of its application to be bounded only by the limits of an administrative discretion; and that a legislature may not validly delegate to an administrative body the power to establish the extent of its own authority.

POINT II

ORDINARY MEANING AND EFFECT MUST BE GIVEN TO ALL THE LANGUAGE IN A STATUTE. THIS IS TRUE HERE OF THE REFERENCE TO "CONTROLLING INFLUENCE". ITS PLAIN MEANING IS AN INFLUENCE WHICH IN FACT EXISTS AND IS IN FACT CONTROLLING.

There is no statutory definition of the phrase "controlling influence" or of either of those words. There is nothing obscure about them, nor do they interrelate with anything else in the Act. They must, therefore, be given their ordinary meaning.

The concept of a controlling influence is not mysterious. It is the same concept as that commonly expressed by the courts when they speak of the controlling part of a statute, or of a controlling decision on a proposition of law, or of controlling evidence which determines the action of a court or jury on matters of fact. Something which is controlling is a thing which must be acted upon and must be obeyed. A controlling influence is such that it compels its desired result. Anything short of that may be substantial influence or material influence, or some other kind or degree of influence, but it cannot be said to be controlling influence.

The legislative history of the Act shows that as originally introduced in both the House (H. R. 5423) and the Senate (S. 1275) the corresponding clause then used the phrase "material influence" and that this was later changed by amendment and the phrase "controlling influence" used in the final bill as enacted.

Congress deliberately took out the adjective "material" and inserted in lieu thereof the adjective "controlling". Congress thus showed that it intended that in order to

subject a company to the Act under clause (iii), there must exist something more than influence and more than a material influence—the influence must be controlling.

The Court below, however, held that the phrase "controlling influence" as used in the Act does not necessarily mean that those exercising it must be able to carry their point, that a controlling influence may be effective without accomplishing its purpose fully and that such an influence may be inferred as a "latent power" in spite of conclusive proof that no such influence is being exercised. It is submitted that such interpretation in effect repeals the word "controlling" in the Act and by judicial fiat seeks to substitute the concept of "material" which the Congress itself first considered and finally rejected.

It is further submitted that neither the opinion of the court below, nor the findings of the Commission, justifies the conclusion that petitioner has failed to prove that it is not subject to any holding company influence which under any proper construction could be regarded as "controlling".

POINT III

SUCCESSIVE CLAUSES IN THE SAME STATUTE MUST BE CONSTRUED TO BE DESIGNED FOR DIFFERENT PURPOSES. THE CONSTRUCTION BELOW RENDERS SUPERFLUOUS THE SUBSEQUENT REFERENCE IN THE ACT TO THE "PUBLIC INTEREST" AND THE "PROTECTION OF INVESTORS OR CONSUMERS".

The reference to the public interest and protection of investors and consumers is written in the Act as a qualification of the condition of being subject to a controlling influence by a holding company. Even if an applicant were subject to a controlling influence of a holding company (under any construction of the phrase "controlling influence") it

would still be entitled as a matter of substantive right to an order exempting it from regulation if it made a satisfactory showing that the character of that influence is not adverse to the public interest or to investors or consumers.

Unless the language is construed as intended to be applied in each case as a test of the character of the influence of the specified holding company upon the management and policies of the particular applicant, it would be superfluous. Moreover, unless the character of an influence is to be tested by proof of the results, or lack of results, of such influence, it would be impossible for any applicant ever to make a case which would entitle it to an order granting its application. It would always be possible for the Commission to speculate about the future (as was done in the opinion of the court below) and to say that normal corporate characteristics make it necessary or appropriate that the operating company be subjected to regulation. Such conclusion could be drawn in every case from the mere existence of a controlling influence—and has here been based upon a speculation that there may be a latent influence which might be partially effective.

The Commission gave no hint of any facts or theory upon which it based its conclusion that it did not think that petitioner had proven this phase of its case. It only said (R. 681) that "* * * In view of all the circumstances, we do not think Edison has demonstrated that it is not necessary and appropriate * * * (etc.)."

Conclusions expressed merely in the language of a statute are not sufficient to support an order. Compare *Pacific Power & Light Co.* v. *F. P. C.*, 98 F. (2d) 835 (1938); *Saginaw Broadcasting Co.* v. *F. C. C.*, 96 F. (2d) 554, 560 (1938) cert. den. 305 U. S. 613; *Tri-State Broadcasting Co.* v. *F. C. C.*, 96 F. (2d) 564, 566 (1938); *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 295 U. S. 193, 201 (1935).

In its reply brief to the court below the Commission acknowledged that there was not anything in the record from which one might imagine that any influence of North American over petitioner was harmful in any way. It made the bald claim that the Commission was entitled to regulate all relations subject to a controlling influence no matter how "good" any influence might have been proven to have been. That is a claim of discretion so unlimited, and a disclosure that its exercise will be so inflexible, that it wholly thwarts the effort of Congress to enact a rule of law for such cases. It repeals the whole reference to the public interest and the protection of investors and consumers and leaves condition (iii) of the Act with the meaning it would have had if that reference had not been included. Successive clauses in a statute must, instead, be construed so that full effect will be given to the meaning of each one. *People* v. *Luhrs,* 195 N. Y. 377, 381 (1909); *Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208 (1932).

The result of the opinion below is to leave the Commission free to regulate any public utility company in which any holding company has any stock interest, regardless of any proof of the independence of the subsidiary or the character of the influence or the lack of harm therefrom to anyone.

The Commission hesitated, for some time, to take the extreme position we outline. In this case it waited for its reply brief and final argument in the court below. In other cases it had purported, in some degree, to give effect to the Congressional intention. See *In the Matter of West Penn Railways Company,* H. C. A. Release 953 (1938); *In the Matter of H. M. Byllesby & Co.,* H. C. A. Release 1882, 6 S. E. C. 639 (1940); *In the Matter of Wisconsin Valley Improvement Co.,* H. C. A. Release 2359 (1940).

There is no question in this case of the completeness and conclusiveness of the proof on this issue. Every evil so carefully specified in Section 1 of the Act as attendant upon the character of controlling influence which Congress intended to have regulated, was negatived by proof at the trial—as the Commission finally bore witness to the court.

Congress did not delegate to the Commission the discretion of determining what sort of influence would require regulation. It did not even leave the construction of those terms to implication from the general spirit and purpose of the law. It enumerated explicitly in Section 1 of the Act the kind of abuses which it declared to be injurious to investors, consumers and the general public, and categorically laid down the rule that "* * * it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section * * *".

Petitioner submits that it is vital to public confidence in the judicial process, that the application of the rule so positively expressed by Congress, and of the elementary principles of statutory construction, be reviewed by this court.

POINT IV

FEDERAL JURISDICTION CANNOT BE CREATED BY WAIVER OR CONSENT. IT MUST EXIST. THE QUESTION MAY BE RAISED AT ANY STAGE OF ANY PROCEEDING.

Jurisdiction is the threshold of every court and commission, over which one may not cross, or drag another, without the proper credentials.

Federal jurisdiction is peculiarly limited by the Constitution but is not on that account made irrelevant to any

type or stage of proceeding. It is familiar practice for a court, of its own motion, to raise the question of jurisdiction, and for an appellate court to dismiss a proceeding when the record does not contain adequate proof of jurisdiction. *Chicago, Burlington and Quincy Railway Company* v. *Willard,* 220 U. S. 413 (1911).

In this case the Commission did not find a basis for jurisdiction or express any opinion about it. It ignored petitioner's proofs and protests on the subject. Before the Court it claimed that the question had been waived, and furthermore that it was a constitutional one and therefore could not be raised until some later attempt to enforce against petitioner other provisions of the Act. The court below, in effect, sustained those arguments.

This result treats a constitutional limitation on administrative jurisdiction differently from other limitations and thus extends the boundaries of federal power in a novel and dangerous way. The judicial and executive branches of the government do not imperil its citizens as would the new hybrid administrative bodies acting behind such a shield.

In holding that the question is prematurely raised the opinion below resurrects the negative order doctrine in a new disguise and fails to appreciate the nature and effect of the order in question. Section 2(a)(8) of the Act serves no purpose independent of other features of the Act as the Commission seems to contend. Its sole function is to define those companies which are subject to the Act as subsidiaries. The restrictions of the Act and of Rules and Regulations of the Commission are *automatically* applicable upon a determination of status under Section 2(a)(8) and a company's rights are thereby subjected not only to threats but to injury from the many restrictions and prohibitions which are directly and immediately consequent upon such determination of status.

Petitioner submits that this Court should review the action of the court below to clarify the principles governing, and to correct the practice of, lower tribunals with respect to the assertion and exercise of federal administrative power and the review of that ever increasingly important class of quasi-judicial determinations which subject the affected persons to a great body of prohibitions, restrictions and obligations without further act or order and without any judicial determination that they are properly within the scope of the asserted power.

Respectfully submitted,

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